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TO THE

Supreme Court of the United States

OCTOBER, 1980 TERM

KAREN TOWNSEND BROWN

versus

DONALD R. BROWN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Karen Townsend Brown, prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Louisiana sustaining defendant's Peremptory Exception of Res Judicata to petitioner's suit for alimony.

QUESTIONS PRESENTED FOR REVIEW

1. Is Louisiana barred under the Full Faith and Credit Clause from awarding alimony in a suit between two of its citizens subsequent to an Arkansas divorce between them, because of an Arkansas jurisdictional rule that everything that "might have been pleaded" is barred by res judicata, when alimony was not an issue nor was litigated in Arkansas?

2. Does Louisiana have sufficient interest in regulating the support obligations of its citizens, in a suit between two of its citizens, to award post-divorce alimony notwithstanding an Arkansas res judicata rule that would prevent such an award in Arkansas because the claimant spouse did not seek alimony or reserve her right to it in an Arkansas consent divorce between them at a time when they were Louisiana citizens?

LIST OF PARTIES TO PROCEEDING

Karen Townsend Brown
Donald R. Brown

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1. Fourth District Court, Ouachita Parish, Louisiana Reasons for Judgment on Exception of Res Judicata (not reported).
2. Karen Townsend Brown v. Donald R. Brown, La. App., 377 So. 2d 438.
3. Karen Townsend Brown v. Donald R. Brown, La., 379 So. 2d 1101.
4. Karen Townsend Brown v. Donald R. Brown, La. 1980, 387 So. 2d 565.

STATEMENT OF GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the Supreme Court of the State of Louisiana sought to be reviewed was rendered May 19, 1980, Justices Calogero and Watson dissenting. The dissenting opinion is filed June 4, 1980. Petitioner timely filed for a Rehearing on May 29, 1980 (Rule IX, Section 1 of the Louisiana Supreme Court Rules). The Application for Rehearing was denied on September 19, 1980, Justices Calogero, Watson and Lemmon voting to grant a rehearing. Jurisdiction of this Honorable Court to review the judgment in question is conferred by 28 U.S.C. §1257(3). The Full Faith and Credit Clause of the Constitution of the United States, Article IV, Section 1 was construed by the Louisiana Supreme Court as precluding an award of post-divorce alimony to petitioner.

CONSTITUTIONAL PROVISION INVOLVED IN CASE

Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state. Article IV, Section 1 of the Constitution of the United States.

STATEMENT OF THE CASE

At all relevant times, both Mr. and Mrs. Brown were citizens of the State of Louisiana and domiciled in the City of Monroe, Ouachita Parish, Louisiana, in close proximity to the Louisiana-Arkansas border. Mr. Brown is a prominent Monroe attorney-at-law. In a consent proceeding, Mrs. Brown filed a petition in the Chancery Court of Union County, Arkansas (at El Dorado, Arkansas, approximately 60 miles from Monroe) seeking a divorce and custody of their four children. She did not seek alimony or child support and no judgment of alimony or child support was rendered. On June 10, 1977, Mr. Brown filed a waiver and entry of appearance, and on the same date a judgment of divorce and custody was rendered, in which Mr. Brown was adjudicated to be at fault.

Thereafter, in August, 1978, Mrs. Brown sought alimony and child support in the District Court of Ouachita Parish, Louisiana. Mr. Brown filed a Peremptory Exception of Res Judicata to her claim for post-divorce (permanent) alimony, which exception was sustained by the Trial Court and affirmed by the Court of Appeal, Second Circuit, and the Supreme Court of the State of Louisiana.

All Courts held that Louisiana was bound, under the Full Faith and Credit Clause, to give effect in Louisiana to the Arkansas Res Judicata rule that precludes relitigation not only of all matters at issue in the Arkansas divorce proceeding, but also all matters which could have been raised by Mrs. Brown.

The federal question was raised in the Trial Court by the Exception of Res Judicata. The Trial Court held:

> "Louisiana Courts, pursuant to constitutional and statutory mandate, should give the same effect to the Arkansas divorce that the courts of Arkansas would. U.S. Const. Art. 4, §1; 28 U.S.C. 1738; *Golson v. Golson*, 351 So. 2d 100 (La., 1977)"

On appeal to the Court of Appeal, Second Circuit, State of Louisiana, applicant assigned as error:

> 2. Alternatively, the trial court erred in holding that it was bound, under the Full Faith and Credit Clause, to apply Arkansas principles of Res Judicata to the divorce decree.

The Court of Appeal, Second Circuit, State of Louisiana held:

> "To determine the preclusive effect of the Arkansas divorce decree upon the issue of alimony, one must look to the law of Arkansas, the rendering state. As discussed above, the Arkansas law holds that once the divorce decree is granted, the question of alimony is res judicata, even though alimony was not sought and the issue was not litigated....Because of Full Faith and Credit, Louisiana must give the same res judicata effect to the Arkansas decree as Arkansas would." 377 So. 2d 438, at 440.

In her Application for Writs to the Louisiana Supreme Court (granted 379 So. 2d 1101), applicant urged the identifcal Assignment of Error quoted above. The Louisiana Supreme Court held:

> "We therefore hold that the Arkansas judgment is entitled to full faith and credit, and we must give it the same preclusive effect that it would have in Arkansas. Plaintiff is precluded by that judgment from obtaining permanent alimony." 387 So. 2d 565 at p. 567.

ARGUMENT

The Louisiana courts held that Arkansas follows the old Common Law Res Judicata Rule that bars relitigation not only of all matters actually litigated between the parties, but also all matters which "might have been" litigated (*Miller v. Miller*, 190 S.W. 2d 991 (1945); *Taylor v. Taylor*, 153 Ark. 266, 240 S.W. 6 (1922); *Ellis v. Ellis*, 249 S.W. 2d 302 (1952)), and held that, because Mrs. Brown had not sought alimony in a prior Arkansas divorce proceedings between the parties nor reserved her right to do so in the future, that she was barred in Arkansas from seeking alimony. The Louisiana Courts further held that Full Faith and Credit required that Louisiana give this same preclusive effect to the Arkansas decree in a subsequent Louisiana suit by Mrs. Brown for alimony. Arguably, Arkansas has abandoned this old Common Law Res Judicata rule. See *May v. Edwards* (Sup. Ct. Ark. 1975) 529 S.W. 2d 647, *Moorman v. Chisler* (Sup. Ct. Ark. 1974) 506 S.W. 2d 840, *Hastings v. Rose Courts, Inc.* (Sup. Ct. Ark. 1963) 373 S.W. 2d 583, *Thornbrough v. Barnhart* (Sup. Ct. Ark. 1960) 340 S.W. 2d 569, *Riegler v. Riegler*, (Sup. Ct. Ark. 1968) 426 S.W. 2d 789, *Howard v. Green* (8th Cir. C. A. Ark. 1977) 555 Fed. 2d 1978.

Louisiana follows the Civil Law rule, incorporated in Louisiana Civil Code Article 2286:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

In Louisiana, a subsequent suit for alimony would not be barred under the Civilian concept of res judicata, as the object of the suit, the thing demanded, and the cause of action are all different. See *Sliman v. McBee*, 311 So. 2d 248 (La. 1975) and *Sewell v. Argonaut Southwest Insurance Company*, 362 So. 2d 758 (La. 1978). Additionally, because Mr. Brown was adjudicated to be at fault in the Arkansas decree, Mrs. Brown is entitled to permanent (post-divorce) alimony upon proof of her need and the ability of Mr. Brown. Civil Code Article 160; *Fulmer v. Fulmer*, 301 So. 2d 622 (La. 1974). The only bar is the application of the Full Faith and Credit Clause.

In the case at bar, both parties were citizens and residents of Louisiana at the time of the institution of the divorce suit, the rendition of the divorce judgment, and subsequent thereto. Neither was a resident nor a citizen of Arkansas. Louisiana is the only state having any interest in the support obligations of the parties to each other, and, inferentially, to their four children. Arkansas has no further interest in the parties.

The status or condition of a person and the relation in which he stands to other persons are fixed by the law of the domiciles of the parties. 16 Am. Jur. 2d, "Conflicts of Laws," §12, page 26; 15 A C.J.S., "Conflicts of Laws," §§14 (1) - (8). Therefore, the obligation of Mr. Brown to support Mrs. Brown (and the minor Brown children) is determined by Louisiana law, (*Yarborough v. Yarborough*, 290 U.S. 202, 78 L. Ed. 269 (1933), majority opinion, footnote 24), except for the claimed preclusive effect of Full Faith and Credit.

This Honorable Court has not addressed itself definitively to the question presented in this case: is Louisiana bound, as between two of its citizens, to give the same preclusive effect to the Arkansas decree that would be given it in Arkansas, or does

Louisiana have sufficient interest in the welfare of its citizens to apply its own res judicata rule?

The question was left open in *Yarborough v. Yarborough*, 290 U.S. 202, 78 L. Ed. 269 (1933). Mr. Justice Stone, dissenting, pointed out that this Honorable Court has held that a state need not give full faith and effect to judgments of a sister state in a number of instances, including these "for conviction of crime or for penalties," and judgments that are violative of "a local policy against allowing to foreign corporations the use of local courts in settling foreign disputes," that a judgment establishing the right of an illegitimate or adopted child to inherit from his putative parent "does not establish his right to inherit land in another state," that litigation in another state with respect to the proper construction of a will or to apportion the rights of the parties a divorce decree will not "be conclusive with respect to land outside the state," because of "(t)he interest of a state in controlling all the legal incidents of real property located within its boundaries is deemed so complete and so vital to the exercise of its sovereign powers of government within its own territory as to exclude any control over them by the statutes or judgments of other states." Additionally, one state by its judgment may not foreclose "the power of a state to pass judgment upon the sanity of its own citizens" or forbid marriage of one or both parties to a divorce in another state.

> "Whatever may be said of the local interest which was deemed controlling in those cases in which this Court has denied to a state judgment the same force and effect outside the state as is given to it at home, it would not seem open to serious question that every state has an interest in securing the maintenance and support of minor children residing within its own territory so complete and so vital to the performance of its functions as a government, that no other state could set limits upon it ...
>
> ... it is not for us to say that a state is not free, within constitutional limitations, to regard that interest as fully as important and as completely within the realm of state power as the legal incidents of land located within its

> boundaries, or of a marriage relationship, wherever entered into but of which it is the domicile, or its power to pass upon the sanity of its own residents, notwithstanding the earlier pronouncements of the courts of other states." *Yarborough*, supra, Dissenting Opinion of Mr. Justice Stone.

Also, this Honorable Court has consistently approved a modification of the full preclusive effect of foreign custody awards. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947), *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953), *Kovacs v. Brewer*, 356 U.S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008 (1958); *Ford v. Ford*, 371 U.S. 187, 83 S. Ct. 273, 9 L. Ed. 2d 240 (1962).

The Full Faith and Credit Clause "does not command that the obligations attached to a status because once appropriately imposed by one state shall be forever placed beyond the control of every other state, without regard to the interest in it and the power of control which the other may later acquire." Mr. Justice Stone, dissenting in *Yarborough*.

Conflict of Laws, Second, Section 103 adopts this view:

> "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."

The Reporter's Note reveals that the rule is based primarily upon the views expressed by Mr. Justice Stone in his dissenting opinion in *Yarborough*, in his majority opinions in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935) and *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), the concurring opinion of Mr. Justice Rutledge in *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947) and the concurring opinion of Mr. Justice Frankfurter in *May v. Anderson*, 345 U.S. 528 (1953).

Additionally, a state with a reasonable interest in a controversy may disregard an earlier judgment so long as what it

seeks to do is not irreconcilable with what was decided in the first case. *Magnolia Petroleum Company v. Hunt*, 320 U.S. 430 (1943), Justice Douglas dissenting at p. 449, and *Industrial Commission of Wisconsin v. McCarter*, 330 U.S. 622 (1947).

The mandate of full faith and credit will on occasion give way before the paramount interests of an individual state. *Yarborough v. Yarborough*, supra, Justice Stone dissenting at 290 U.S. 214-215, *Williams v. North Carolina*, 325 U.S. 226, 320 (1945), *Esten v. Esten*, 334 U.S. 555 (1948), and *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

See, also, Reese and Johnson, "The Scope of Full Faith and Credit to Judgments," 49 *Columbia Law Review* 153 (1949).

Louisiana has a strong public policy in favor of alimony. See *Holliday v. Holliday*, (La. Sup. Ct. 1978) 358 So. 2d 618, holding that although the parties to an antenuptial agreement had the requisite capacity to enter into such an agreement, that a waiver of right to alimony in the event of a judicial separation from bed and board "is null and void as against public policy." (at p. 619) A similar strong public policy exists with regard to support of children, prohibiting the waiver of this societal obligation, *Walder vs. Walder*, (La. 1925), 159 La. 231, 105 So. 300. To permit Louisiana to enforce its public policy as between two of its citizens does not interfere with any interest that Arkansas had or has, as that state has no interest of any nature whatsoever in the regulation and enforcement of these obligations as between two Louisiana citizens. Nor would it require the respondent to relitigate any issue already decided between the parties, as neither alimony nor child support was requested nor adjudicated in the Arkansas divorce proceedings. The principle of Res Judicata is founded on considerations of judicial economy, protection against protracted and endless litigation, and certainty and finality of judicial decrees. To permit Louisiana to adjudicate the support obligations (as between each other and with respect to their children) of two of its citizens in this case does no violence to the considerations underlying the principle of res judicata.

Undoubtedly, Arkansas has, within constitutional limitations, the undisputed right to determine, as between its own citizens, the consequences of a divorce, i.e., the right to remarry, the custody of the children of the marriage, the distribution of marital property, and the right to or lack of right to alimony and child support. But it does not have the right to impose these reflections of its public policy on the parties for the balance of their lifetime, after the parties have become citizens of other states. It may prohibit the remarriage of its citizens, as long as they remain its citizens. But it cannot impose its public policy on another state which permits remarriage. A state may properly decide that its public policy dictates that divorced persons should owe no duty of support to former spouses under any conditions, i.e., Texas. But that state may not enforce that public policy on another state after the parties have become citizens of the latter state which recognizes such a duty of support, i.e., Louisiana. Arkansas may properly decide, as between its own citizens, that it will refuse to consider support obligations not urged in the divorce proceedings. But it cannot impose this policy in Louisiana when those support obligations are properly urged in post-divorce proceedings between two Louisiana citizens. In *Restatement* language, such a result "is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State," Louisiana.

Louisiana has an important and legitimate interest in regulating the support obligations of its citizens. The regulation of those obligations may not "be forever placed beyond the control" (*Yarborough*, Justice Stone dissenting) of Louisiana because of an Arkansas procedural rule that requires the assertion of post-divorce support obligations in the divorce proceedings.

To permit Louisiana to adjudicate the support obligation between two of its citizens in the case at bar does no violence to "the national policy of full faith and credit," does not interfere with any legitimate interest that Arkansas has in the

matter, does not require the reopening and relitigation of a foreclosed issue, and does not detract from considerations of judicial economy and certainty of judicial decrees; but would allow Louisiana to protect and enforce its legitimate and important interest in the support obligations of its citizens. To permit Louisiana to proceed would constitute a proper balancing of the considerations of "the national policy of full faith and credit" and the "important interest of a sister State."

IMPORTANCE OF ISSUE

The issue presented in the Petition for Certiorari does not arise out of an isolated dispute between the parties. The large increase in divorce and the mobility of society have multiplied the issues concerning the consequences in sister states of a divorce decree. Varying support policies are evident in the rendering states: alimony may not be modified, may not be modified upwards, post-divorce alimony may not be awarded, alimony may be modified upon a showing of changed circumstances, and alimony may not be awarded except in the original divorce decree, among others. See Foster and Freed, "Modification, Recognition and Enforcement of Foreign Alimony Orders," Vol. 11, *California Western Law Review* 280. Each rule represents the internal public policy of a state. The extent to which that public policy is binding on a sister state when the parties are no longer citizens of the rendering state is the issue in this petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case presents squarely the issue of the balance of the national policy of full faith and credit and the right of a state's legitimate and important interest in enforcing support obligations between two of its citizens.

2. The decision of the Louisiana Supreme Court sought to be reviewed, *Brown v. Brown*, La. 387 So. 2d 565 is in conflict with the decision of the Nevada Supreme Court in *Clark v. Clark* (Nevada Sup. Ct. 1964) 389 P. 2d 69, which held that it was not barred under the Full Faith and Credit clause from considering a husband's counterclaim for a divorce by a Florida res judicata rule barring relitigation of all issues which "might have been litigated." Nevada held that "The constitutional requirement is fully met when we recognize the Florida judgment as it stands — a final determination that the husband and wife may live separately, with support provided, and resting upon the conclusion that the husband had been guilty of cruelty to his wife. Accordingly, in deciding the preclusive effect to be given this final judgment in the Florida court, we are not to be governed by the Florida law of res judicata, or estoppel, or by the effect of those doctrines upon the husband's ability to procure a divorce in that state, had he litigated his case there. It seems to us that we are at liberty to follow Nevada law as to the scope of the doctrine of res judicata and estoppel, particularly in cases dealing with status where important state interests and public policies are involved."

3. The Louisiana Supreme Court has decided an important question of federal constitutional law which has not been, but should be settled by this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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BY _____
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APPENDIX

a. Copy of Opinion and Dissenting Opinion of Supreme Court of State of Louisiana sought to be reviewed, 387 So. 2d 565.

b. Copy of Order of Supreme Court of Louisiana denying Rehearing.

c. Copy of Opinion, Court of Appeals, Second Circuit, State of Louisiana in *Brown v. Brown*, 377 So. 2d 438.

d. Copy of Opinion, Fourth Judicial District Court, Ouachita Parish, Louisiana, in *Brown v. Brown*.

Supreme Court of Louisiana

No. 66,429

KAREN TOWNSEND BROWN

V.

DONALD R. BROWN

ON WRIT OF REVIEW
TO THE
SECOND CIRCUIT COURT OF APPEAL
PARISH OF OUACHITA

ELLIS, JUSTICE AD HOC

Plaintiff Karen Townsend Brown was divorced from her husband, Donald R. Brown, by judgment of the Chancery Court of Union County, Arkansas, on June 10, 1977. In that suit she prayed for and was granted the divorce, and custody

of four minor children. Alimony was not prayed for and the judgment was silent on that point.

This suit was filed in August, 1978, asking that the Arkansas judgment be given full faith and credit; that she be awarded custody of the children; and that she be awarded alimony and child support. Defendant did not contest his obligation to pay child support, but filed a peremptory exception of *res judicata* as to the demand for permanent alimony. The exception was sustained in the trial court, and that judgment affirmed in the Court of Appeal. *Brown v. Brown*, 377 So. 2d 438 (La. App. 2nd Cir. 1979). We granted certiorari to review the propriety of the judgment.

The common law rule of *res judicata* is much broader than the civilian rule which applies in Louisiana. Arkansas applies the broader common law rule. In *Miller v. Miller*, 190 S.W. 2d 991 (1945) the Arkansas Supreme Court said:

> "In the case of Nelson v. Nelson, 146 Ark. 362, 225 S.W. 619, 620, this court said:
>
> > 'It follows also that the allowance of attorney's fees must be reversed.
> >
> > At Section 49 of the article on Alimony in 1 R.C.L., at page 902, the law is announced as follows: 'As a general rule, an action for alimony cannot be brought after the rendition of a judgment for divorce, even though the decree is silent on the matter; for, as the question of alimony might, and should, have been litigated therein, such decree operates as res judicata as to the question of alimony.' See, also, 7 R.C.L., p. 792.
> >
> > 'The original decree undertakes to settle and did adjudicate, the marital rights of the parties. The divorce granted was an absolute one, and terminates the husband's liability for his wife's obligations. He would thereafter be no more liable for her lawyer's fees than he would be for any other contractual obligation which she had incurred.'

"In American and English Annotated Cases, vol. 40 (Ann. Cas. 1916B), page 875, there is an extensive note or annotation on 'Doctrine of Res Judicata as Applicable to Divorce Proceedings'; and on page 898 of that annotation, the rule is stated:

> 'All questions concerning alimony which are or ought to be determined in a divorce proceeding are res judicata in a subsequent proceeding in the same jurisdiction.'

"See also 17 Am Juris. 442, 482, 484.

"There was no language in the divorce decree of September 25, 1944, reserving the question of alimony for subsequent disposition. When Mrs. Dessie Miller failed, either to have monthly payments of alimony provided in the decree of divorce, or to have the question of alimony reserved for further consideration, she allowed the decree to become res judicata on the question of alimony; ..."

See also *Ellis v. Ellis*, 249 S.W. 2d 302 (1952); *Taylor v. Taylor*, 153 Ark. 266, 240 S.W. 6 (1922).

We think it clear that plaintiff would be precluded from recovering alimony in Arkansas, since she neither asked for it in the Arkansas suit nor reserved her right to do so in the future.

Plaintiff, however, claims that Louisiana is not bound to apply the Arkansas rule of *res judicata* in its own courts. It is, of course, settled that this State will give full faith and credit to divorce decrees of other states which are unassailable in those states. U.S. Constitution, Art. 4, Sec. 1; *Boudreaux v. Welch*, 249 La. 983, 192 So. 2d 356 (1966). In *Golson v. Golson*, 351 So. 2d 100 (La. 1977), this Court said:

"Article 4, Section 1 of the United States Constitution provides:

> 'Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'

"Pursuant to this grant of authority, Congress enacted the following statute:

> 'The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> 'The records and judicial proceedings of any court of any such State, Territory or Possession or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> '*Such* Acts, records and *judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States* and its Territories and Possessions *as they have by law or usage in the courts of such State,* Territory or Possession *from which they are taken.*' [Emphasis supplied.] 28 U.S.C. 1738.

"Under the statute, therefore, Louisiana should give the Tennessee divorce the same effect that Tennessee would give it. *New York v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); *Morris v. Jones,* 329 U.S. 545, 67 S. Ct. 451, 91 L. Ed. 488 (1947)."

We therefore hold that the Arkansas judgment is entitled to full faith and credit, and we must give it the same preclusive effect that it would have in Arkansas. Plaintiff is precluded by that judgment from obtaining permanent alimony.

For the foregoing reasons, and for the reasons most capably expressed in the opinion of the Court of Appeal, the judgment is affirmed, at plaintiff's cost.

Affirmed.

Calogero, Jr. dissents and assigns reasons.
Watson, J. dissents.

Supreme Court of Louisiana

KAREN TOWNSEND BROWN

versus No. 66,429

DONALD R. BROWN

CALOGERO, Justice, dissenting

I am not certain that res judicata bars assertion of a Louisiana right to post-divorce alimony in this case where both spouses now live in Louisiana and where the alimony issue was not litigated in the Arkansas divorce proceeding. This case appears to fall within the issue left open in Yarborough v. Yarborough, 290 U.S. 202, 78 L. Ed. 269 (1933). In *Yarborough, supra,* the Supreme Court held that South Carolina was required to give full faith and credit to a Georgia judgment terminating a father's obligation to support his daughter upon payment of a lump sum to a trustee for his daughter. The daughter in *Yarborough* was domiciled in South Carolina, but the father at the time of suit was still a resident of Georgia. The court noted however, that they did not decide whether South Carolina would have had the power to require the father if he were domiciled in South Carolina to make further provision for the support, maintenance, or education of his daughter. 290 U.S. at 213.

Justice Stone, dissenting in *Yarborough, supra,* stated that full faith and credit "does not command that the obligations attached to a status because once appropriately imposed by one state shall be forever placed beyond the control of every other state, without regard to the interest in it and the power of control which the other may later acquire." 290 U.S. at 219. Justice Stone pointed out that it was universally accepted that a divorce decree which by its terms or by operation of law forbids remarriage could have not effect outside the state which rendered it. 290 U.S. at 217, 218.

In this case we should determine whether Louisiana under the circumstances presented here has sufficient interest in the subject matter to award post-divorce alimony notwithstanding the Arkansas jurisprudential rule that "what might have been" pleaded is barred by res judicata. *See* Reese and Johnson, "The Scope of Full Faith and Credit to Judgments," 49 Col. L.R. 153 (1949). Because the majority takes a mechanistic approach to full faith and credit and does not squarely face this issue, I respectfully dissent.

Supreme Court of Louisiana

NEW ORLEANS 70112

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE #95

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *12th day of September, 1980,* the following action was taken by the Supreme Court of Louisiana in the case listed below:

WRIT DENIED:

80-K-2094 State v. Wallace Istre (Acadia Parish)

On the *15th day of September, 1980,* the following action was taken by the Supreme Court of Louisiana in the case listed below:

STAY ORDER GRANTED:

80-K-2116 State v. Kenneth J. Sharp, Jr. (Jefferson Parish)

On the *17th day of September, 1980,* the following action was taken by the Supreme Court of Louisiana in the case listed below:

CONTINUATION OF STAY ORDER GRANTED:

66,656 State v. Roger S. Bourgeois (Jefferson Parish)

On the *18th day of September, 1980,* the following action was taken by the Supreme Court of Louisiana in the cases listed below:

WRIT GRANTED:

80-K-2131 State in the Interest of Chris Aaron (E. Baton Rouge Parish)
With order.

APPLICATION DENIED:

80-O-2068 In Re: Application of Carole Shelby Carnes Tucker MARCUS, BLANCHE & WATSON, J.J., would deny with no reservations.

On the *19th day of September, 1980,* the following action was taken by the Supreme Court of Louisiana in the cases listed below:

BY CALOGERO, J.:

67,236 C/W State of La. v. Charles Brown, Jr. (Orleans Parish)

67,738 State of La. v. Vernon Bernard (Orleans Parish)
(Possession of pentazocine (Talwin)
Accordingly, we hold that the portion of the statute making it illegal "unknowingly" to possess a Scheduled IV substance is unconstitutional. The remainder of the statute is valid and the trial courts' rulings sustaining the defendants' motions to quash are reversed and the cases remanded to the trial court for further proceedings in accordance with the views expressed herein.
REVERSED AND REMANDED.

REHEARING GRANTED:

67,261 State v. Jerry L. Devito (Jefferson Parish)

REHEARINGS DENIED:

66,429 Karen Townsend Brown v. Donald R. Brown
CALOGERO, WATSON & LEMMON, J. J., would grant the rehearing.

66,919 State v. William S. Light
(With Per Curiam)
DENNIS, J., would grant a rehearing

(p. 1 of 1 page)

No. 13,967 Judgment rendered October 31, 1979
Application for rehearing may be filed within the delay allowed by Art. 2166, LSA-CCP.

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

KAREN TOWNSEND BROWN Plaintiff-Appellant

V.

DONALD R. BROWN Defendant-Appellee

Appealed From The
Fourth Judicial District Court For The
Parish of Ouachita, Louisiana

Honorable Lemmie O. Hightower, Judge

LOVE, RIGBY, DEHAN, LOVE and McDANIEL
By: Kenneth Rigby
Counsel For
Plaintiff-Appellant

ALLEN HOWARD COON
Counsel For
Defendant-Appellee

BEFORE: PRICE, HALL and JONES, JJ.

JONES, J.

The plaintiff (former wife) appeals a judgment sustaining her former husband's peremptory exception of res judicata to her claim for permanent alimony. The exception was based upon an Arkansas divorce judgment which awarded no alimony in appellant's divorce action where none was sought. We affirm.

The issues are (1) was the judgment res judicata on the issue of alimony in Arkansas where it was rendered? and (2) if so, is Louisiana required to give it Full Faith and Credit under the U.S. Constitution?

Plaintiff-wife obtained a judgment of divorce from defendant in the Chancery Court of Union County, Arkansas in 1977, Both parties appeared, and defendant was adjudicated as being at fault. Plaintiff received custody of the four minor children. The issue of alimony was not raised in the Arkansas court. Plaintiff now seeks to have the divorce decree recognized in Louisiana and to obtain child support and alimony in the amount of $3,000 per month.

The trial court held that plaintiff is barred in Arkansas from now seeking alimony because of the Arkansas concept of res judicata and the Full Faith and Credit Clause required Louisiana to recognize the Arkansas concept of res judicata.

THE DIVORCE JUDGMENT IS RES JUDICATA IN THE STATE OF ARKANSAS AS TO THE ISSUE OF ALIMONY

When plaintiff failed to make a demand for alimony in the Arkansas court, she was thereafter precluded from asserting a claim for alimony in Arkansas. The divorce decree had become res judicata as to the question of alimony once it was rendered without mention of the issue of alimony. This is the holding of *Miller v. Miller*, 209 Ark. 505, 190 S.W. 2d 991, upon which the trial court based its decision. In this case the Arkansas Supreme Court stated:

> "When Mrs. Dessie Miller failed, either to have monthly payments of alimony provided in the decree of divorce, or to have the question of alimony reserved for further consideration, she allowed the decree to become res judicata on the question of alimony; ..." Id. at 993

This case does not "stand alone" for this proposition of law (as plaintiff asserts), and it has never been overruled or modified.

Other cases applying the *Miller* rule of res judicata to divorce judgments are *Ellis v. Ellis*, 220 Ark. 639, 249 S.W. 2d 302; *Taylor v. Taylor*, 153 Ark. 206, 240 S.W. 6; and *Ball v. Ball*, 189 Ark. 975, 76 S.W. 2d 71.

Ellis, supra, involves a similar situation in which the wife sued only for a divorce and the custody of the children. She later claimed her ex-husband owed her money. The language of the Arkansas Supreme Court is pertinent:

> "She did not ask for alimony, maintenance or attorney's fee, being content to ask only for a divorce and the care of the children. Since she failed to ask for, and obtain the relief - which she now claims - when the divorce was granted and when such matter might have been litigated, we hold that it is now res judicata." Id. at 303.

The wife in *Taylor, supra*, obtained a divorce and later sued for a portion of her husband's property under an Arkansas statute giving her one-third of his estate. The Arkansas Supreme Court held:

> "...the lawmakers ... intended ... to give the wife an estate in the nature of dower when a divorce was granted in her favor. If she did not ask and obtain the relief when the decree of divorce was granted to her the matter became res adjudicata." Id. at 8.

In *Ball, supra*, the husband sued the wife for a divorce on the grounds of cruel treatment. She answered, contending a judgment of a Missouri court in which the husband was denied a divorce on the ground of desertion precluded the husband from seeking the divorce in Arkansas. The Arkansas Supreme Court held that since the facts of cruelty existed at the time of the suit in Missouri the issue could have been litigated then.

The cruelty could not later be considered by the Arkansas court because the issue was res judicata in Missouri. The Arkansas court pointed out that Missouri law was the same as Arkansas law in that all issues that might have been raised and litigated were completely barred by the final decree as if they had been directly adjudicated and included in the Missouri judgment. The husband was not entitled to a divorce on the grounds of cruelty which existed at the time he sought the Missouri divorce on the grounds of desertion.

Had plaintiff sued for alimony in Arkansas after obtaining the Arkansas divorce, she would have been barred by res judicata from asserting the alimony claim.

The Arkansas rule on the res judicata effect of a divorce decree upon the alimony issue is not as isolated or unusual as plaintiff claims. In Leflar, *Conflicts of Laws* (1977, 3rd Ed.) at page 465 we find the following statement:

> "If there was personal jurisdiction over the husband in a wife's divorce action, or personal jurisdiction over the wife in the husband's divorce action, so that the support issue could then be tried, the matter is res judicata and cannot thereafter be raised again, whether or not alimony was asked for at the time."
>
> Citing Kresteff v. Kresteff, 79 Ill. App. 2d 170, 223 N. E. 2d 720 (1967); Jackson v. Jackson, 200 A. 2d 380 (D. C. App. 1964); Osborne v. Osborne, 215 Va. 205, 207 S. E. 2d 875 (1974); Bates v. Bodie, 245 U.S. 520, 38 S. Ct. 182 (1918); Lynn v. Lynn, 302 N. Y. 193, 97 N. E. 2d 748 (1951); Wood v. Wood, 174 Ohio St. 318, 189 N. E. 2d 54 (1963).

We have reviewed the cases cited by Leflar and find they fully support the quoted statement.

Our review of the cases cited by appellant to support her contention that the issue of alimony is not res judicata reveals that the cases are factually distinguishable and are inapplicable to the issue here presented.

THE FULL FAITH AND CREDIT CLAUSE REQUIRES EACH STATE TO GIVE EFFECT TO THE RES JUDICATA EFFECT OF THE JUDGMENTS OF OTHER STATES

The Full Faith and Credit Clause, Article IV, §1 of the Constitution of the United States provides in part:

> "Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state."

Full Faith and Credit mandates that the court of each state give to the judgments of other states the same conclusive effect between the parties as is given such judgments in the states in which they were rendered. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943); *Semler v. Psychiatric Institute of Washington, D.C.*, 575 F. 2d 922 (D. C. Cir. 1978). The Louisiana court must give the Arkansas divorce decree the same res judicata effect between the plaintiff-wife and defendant-husband as would be given in an Arkansas court. As correctly stated in *Semler, supra:*

> "A judgment for the plaintiff in a court of a sister state merges the original cause of action and precludes a new suit thereon *to the same extent as this judgment would preclude another suit in the same state.* Thus under the Full Faith and Credit Clause, *the preclusive effect of a judgment must be determined by the law of the state where it was rendered."* (emphasis theirs) Id at 927.

See also *Holm v. Shilensky*, 388 F. 2d 54 (2d Cir. 1968) and the Fifth Circuit *Gov. Personnel Mut. Life Ins. v. Kaye*, 584 F. 2d 738 (1978) and Restatement Second, *Conflicts of Laws*, §95 (1971).

To determine the preclusive effect of the Arkansas divorce decree upon the issue of alimony, one must look to the law of Arkansas, the rendering state. As discussed above, the Arkansas law holds that once the divorce decree is granted, the question of alimony is res judicata, even though alimony was not sought and the issue was not litigated. Plaintiff cannot return to the Arkansas forum and raise the issue of alimony. Arkansas

precludes her from ever raising this issue again. Because of Full Faith and Credit, Louisiana must give the same res judicata effect to the Arkansas decree as Arkansas would. Since plaintiff's claim for alimony would be barred in Arkansas, it cannot be now demanded in Louisiana. Defendant's peremptory exception of res judicata was correctly sustained.

Plaintiff alternatively contends that should we hold the Arkansas decree to be res judicata as to the issue of alimony, then res judicata is a procedural rule and thus need not be applied by Louisiana. Our review of the jurisprudence shows that the federal courts in deciding diversity actions consider res judicata to be a substantive issue. *Priest v. American Smelting & Refining Co.*, 409 F. 2d 1229 (9th Cir. 1969); *Breeland v. Security Insurance Co. of New Haven*, 421 F. 2d 918 (5th Cir. 1969). The federal jurisprudence requires the res judicata effects of foreign judgments to be given Full Faith and Credit. *Magnolia, supra; Semler, supra; Holm, supra; and Gov. Personnel, supra.* Plaintiff's contention is without merit.

Plaintiff also argues that should the Arkansas law preclude plaintiff from seeking alimony there, Louisiana should not be required to apply the Arkansas rule but should apply our res judicata provision which would permit a wife free of fault to seek alimony at a later time even though she did not seek alimony in the divorce action. LSA-C.C. Art. 2286[1]. The decision as to whether the Arkansas policy is good or bad and whether we desire to follow it is one we are not empowered to make. It is of the essence of Full Faith and Credit that one state may not inquire into the rightness or wrongness of another state's policy when enforcing the judgment. *Magnolia, supra; Williams v. North Carolina*, 317 U.S. 287, 87 L. Ed. 279, 63 S. Ct. 207; *Fauntleroy v. Lum*, 210 U.S.

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[1]LSA-C.C. Art. 2286 - The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be found on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

230, 52 L. Ed. 1039, 28 S. Ct. 641; *Yarborough v. Yarborough*, 290 U.S. 202, 78 L. Ed. 269, 54 S. Ct. 181. In each of these cases the state to which the judgment was brought had an interest in the subject matter of the suit and a public policy contrary to that of the state in which the judgment was obtained. However, under Full Faith and Credit the interest of the state in which the judgment was obtained and was res judicata was held to override any contrary policy of the forum to which the judgment was taken. Virginia recognized it was required to deny alimony under its law to a wife who had received no alimony under Texas law in a Texas judgment of divorce in the decision of *Osborne v. Osborne*, 215 Va. 205, 207 S. E. 2d 875 (1974):

> "Under the United States Constitution and federal and Virginia statutes Mrs. Osborne was barred from relitigating in Virginia matters properly adjudicated by the Texas court. The constitutional mandate, as implemented by Congress, requires every state to give a foreign judgment at least the *res judicata* effect which the judgment would be accorded in the state which entered it. Durfee v. Duke, 375 U.S. 106, 109, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963). In Barber v. Barber, 323 U.S. 77, 65 S. Ct. 137, 89 L. Ed. 82 (1944), the Supreme Court held that Tennessee was required to give effect to a North Carolina judgment, not subject to modification in North Carolina, for arrearages in alimony payments. See McKeel v. McKeel, 185 Va. 108, 112-113, 37 S. E. 2d 746, 748-749 (1946). Subject to rare exceptions, the full faith and credit rule applies even though the sister state's judgment reflects policies hostile to those of the forum state. Estin v. Estin, 334 U.S. 541, 546, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438, 64 S. Ct. 208, 88 L. Ed. 149 (1943); Williams v. State of North Carolina, 317 U.S. 287, 294-295, 63 S. Ct. 207, 87 L. Ed. 279 (1942)." Id. at 879.

Plaintiff's policy argument is thus without merit.

Judgment AFFIRMED at appellant's cost.

STATE OF LOUISIANA * PARISH OF OUACHITA
FOURTH DISTRICT COURT

KAREN TOWNSEND BROWN

versus No. 115,094

DONALD R. BROWN

FILED: _____

_____
DEPUTY CLERK OF COURT

REASONS FOR JUDGMENT
ON EXCEPTION OF RES JUDICATA

To that portion of plaintiff's petition seeking permanent alimony for her support, the defendant, Donald R. Brown, has filed an exception of res judicata based on a judgment of divorce his former wife obtained in Arkansas.

The pleadings of record make clear the factual posture of the matter. In essence, we are called to decide the effect of the Arkansas decree upon Mrs. Brown's right to alimony.

Louisiana courts, pursuant to constitutional and statutory mandate, should give the same effect to the Arkansas divorce that the courts of Arkansas would. U.S. Const. Art. 4, §1; 28 U.S.C. 1738; *Golson v. Golson*, 351 So. 2d 100 (La., 1977).

It is clear, and all parties concede, that, under the Arkansas Supreme Court decision in *Miller v. Miller*, 209 Ark. 505, 190 S. W. 2d 991 (1945), the divorce judgment is res judicata in that state on the question of alimony and, such judgment being silent on the matter, Mrs. Brown could not now successfully claim alimony before the courts there.

Inasmuch as the Arkansas decree would have such effect in Arkansas, a forum to which both parties submitted their marital rights and responsibilities for adjudication, it should,

and does, have the same effect in Louisiana with respect to the right to alimony.

We are not in accord with the contention of counsel for plaintiff that the doctrine of res judicata is a rule of procedural law, not of substantive law, and, thus, Louisiana courts are not bound to give full faith and credit to the res judicata effect of the Arkansas decree. Even if, arguendo, we consider the doctrine of res judicata to be merely procedural, it nevertheless may create a substantive right. In our opinion, such a right exists here. The Arkansas decree establishes and adjudicates the marital rights and responsibilities of the parties. By not requiring alimony, it likewise adjudicated that question. Both parties acquired certain rights of substance through, and from, that judgment. Such rights cannot now be relitigated in another jurisdiction.

Exception sustained.

LEMMIE O. HIGHTOWER, JUDGE

CERTIFICATE OF SERVICE

I CERTIFY that three copies of the above and foregoing Petition for a Writ of Certiorari have been served upon Donald R. Brown by depositing three copies thereof in the United States mail, with first-class postage pre-paid, addressed to his counsel of record, Allen Howard Coon, at his Post Office address, 118 South Grand Street, Monroe, Louisiana 71201, on this the 15 day of Dec, 1980.

OF COUNSEL